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AREN'T I A WOMAN? DECONSTRUCTING SEX DISCRIMINATION AND FREEING TRANSGENDER WOMEN FROM SOLITARY CONFINEMENT

Faroat Andasheva*

That man over there says women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman? Look at me! Look at my arm! I have ploughed, and planted, and gathered into barns, and no man could head me! And ain't I woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have borne thirteen children, and seen them most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't I a woman?

—Sojourner Truth[1]

INTRODUCTION

In 2014, an estimated 1.5 million Americans were incarcerated in state and federal correctional facilities.[2] While the disproportionate presence of black and Latino people in American prisons is widely known,[3] transgender individuals are another group that face stark disparities.[4] Nearly 16% of all transgender people are incarcerated at some time in their lives and the number of black transgender individuals represents closer to half of their

* J.D. candidate, Florida International University College of Law, 2017; B.S., Shepherd University, 2014. I would like to thank my friends and family for their unconditional support and encouragement. I would also like to thank Professor Michele Anglade for her support throughout the writing process. Finally, a special thanks to the editors of the FIU LAW REVIEW for publishing my Comment and to Gisselle Perez for carrying out my vision throughout the editing process. This Comment was written with the utmost respect towards the transgender community and I have conducted extensive research for proper terminology. Offensive language, if any, is not intentional and all errors that remain are my sole responsibility.

1 PATRICIA C. MCKISSACK & FREDRICK L. MCKISSACK, SOJOURNER TRUTH: AIN'T I A WOMAN? (1992).

2 Bureau of Justice Statistics, 1 (Dep't of Justice, 2014), https://www.bjs.gov/content/pub/pdf/p14.pdf.

3 *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/criminal-justice-fact-sheet/ (last visited Mar. 29, 2016).

4 NCTE, *Chapter 13: Reducing Incarceration and Ending Abuse in Persons*, A BLUEPRINT FOR EQUALITY: FEDERAL AGENDA FOR TRANSGENDER PEOPLE, http://www.transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_2015_Prisons.pdf (last visited Nov. 7, 2016).

entire population.[5] While life in prison is not glamorous by any means and is often accompanied with violence, transgender individuals face other unique challenges and suffer from abuse from both inmates and correctional staff at higher rates.[6] For example, transgender inmates are sexually assaulted at higher rates compared to their non-transgender counterparts.[7] Research on violence in California correctional facilities revealed that 59% of transgender inmates reported having been sexually assaulted in a California correctional facility in contrast to 4.4% of the random sample of inmates.[8]

Mirroring a diverse and changing American population, correctional facilities find themselves facing the realities of incarcerating transgender ("trans") women—biological males that present or identify as women—in male prisons. Critics often laud "*Orange is the New Black*," a hit Netflix original series for the creation of Sophia Burset, a transsexual woman incarcerated along with other female prisoners.[9] However, Sophia is a unique case because only trans women who underwent sex-reassignment surgery are placed into prisons that match their genitalia.[10] Trans women who choose not to go through sex-reassignment surgery, or are unable to do so because of economic reasons, are almost always placed in male prisons. There, an alarming number of them suffer through sexual and physical abuse, both from other inmates and correctional staff, as well as improper medical care and emotional distress.[11]

However, one thing that "*Orange is the New Black*" did get right is the oft inability of prison authorities to deal with transgender inmates when it comes to their safety.[12] At one point in the show, Sophia suffered from repeated verbal abuse from female inmates due to her transsexuality, which later escalated into a fight.[13] The fictional warden dealt with the situation similar to how correctional authorities do in real life—Sophia was placed into solitary confinement for her own protection and her attackers went

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5 *Id.*

6 Lori Sexton, Valerie Jenness & Jennifer Macy Sumner, *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27:6, 835–66, JUSTICE QUARTERLY (2009).

7 *Id.* at 837.

8 *Id.*

9 *Orange is the New Black: I Wasn't Ready* (Netflix Series July 13, 2013).

10 *See generally* Sydney Tarzwell, Note, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167 (2006).

11 *Id*. at 169.

12 *Orange is the New Black: Don't Make Me Come Back There* (Netflix Series June 11, 2015).

13 *Id.*

unpunished.[14] More often than not, trans women are placed in solitary confinement or administrative segregation for protection from the rest of the inmate population.[15] This policy becomes more problematic because an alarming amount of prisons automatically place trans women into segregation without assessing their needs or an incident that would warrant segregation for safety purposes.[16] As a result, trans women spend an indefinite amount of time, or even the entirety of their sentence, in isolation solely due to their status as transgender.[17]

In the past, all lawsuits brought under federal anti-discrimination laws were unsuccessful because the courts refused to read the word "sex" as encompassing more than traditional notions of male and female.[18] Lawsuits brought by transgender inmates under the Equal Protection Clause, in regards to their placement into segregation or need for medical treatment, have been unsuccessful because jurisdictions across the country do not consider transgender individuals to be a protected class.[19] Thus, their claims were viewed under rational basis review. Under this standard, the courts found that placing transgender individuals into solitary confinement was rationally related to the legitimate purposes of ensuring safety of the prison population.[20]

However, the approach the courts took towards transgender discrimination claims changed after the Supreme Court's decision in an employment discrimination case, *Price Waterhouse v. Hopkins*.[21] There, the Supreme Court ruled that negative comments about the plaintiff's lack of femininity were a motivating factor in passing her over for a promotion and constituted sex discrimination based on gender stereotypes.[22] The holding that discrimination based on gender stereotype is sex-based discrimination changed the way courts look at sex discrimination.[23] Since then, circuit courts throughout the country have applied the reasoning in *Price Waterhouse* to cases across all areas of law. The courts found that discrimination against transgender individuals is sex discrimination because

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14 *Id.*

15 Tarzwell, *supra* note 10, at 180.

16 *Id.* at 194.

17 *Id.* at 171.

18 *See generally* Holloway v. Arthur Andersen & Co., 566 F. 2d 659 (9th Cir. 1977); Ulane v. E. Airlines, Inc., 742 F. 2d 1081 (7th Cir. 1984).

19 *Holloway*, 566 F. 2d at 667.

20 *See* Lopez v. City of New York, No. 05 Civ. (NRB) 10321, 2009 WL 229956 (S.D.N.Y. Jan. 30, 2009); Kaeo-Tomaselli v. Butts, No. 11-00670 LEK/BMK, 2013 U.S. Dist. LEXIS 13280 (D. Haw. Jan. 31, 2013).

21 *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

22 *Id.* at 268.

23 *Id.*

they did not conform to sex stereotypes by expressing appearance and mannerisms inconsistent with their biological sex.[24] However, successful transgender discrimination cases under *Price Waterhouse* prevailed because the courts held that plaintiffs were discriminated against due to their "gender non-conforming" appearance, rather than their transgender identity.[25]

However, this popular judicial interpretation of *Price Waterhouse* forces plaintiffs to file claims as a man or a woman whose appearance does not match his or her biological sex and totally disregards the desires of plaintiffs to get justice for expressing their gender identity. The federal district court in *Schroer v. Billington* recognized the problematic framework of *Price Waterhouse* as applied to transgender individuals and proposed an approach of treating discrimination against transgender individuals as sex discrimination *per se*.[26] The court reasoned that transgender individuals were discriminated against due to the perpetrator's intolerance towards people whose gender identity did not match their anatomical sex rather than failure to conform to sex stereotypes.[27] Despite *Schroer's* progressive holding, courts throughout the country continue to apply the *Price Waterhouse* reasoning when dealing with transgender discrimination.[28] However, application of *Price Waterhouse* to transgender discrimination cases is harmful because its framework inherently misunderstands the biological and sociological reality of transgenderism and further perpetrates cissexist gender binary system of our society. Expanding on *Schroer's* holding that transgender discrimination is sex discrimination and deconstructing the notion that sex is only male and female will lead to a framework that protects trans and other non-gender conforming individuals from sex discrimination. To be clear, the argument here is not that trans women have a constitutional right to live among the general inmate population. Rather, courts must recognize transgender discrimination as discrimination against transgender people and not as against men or women who fail to conform to stereotypes of their biological sex. Doing so will give transgender individuals their day in court under an appropriate framework that does not "misconstrue their existence. Expanding "sex" discrimination beyond the dichotomous "male" and "female" would allow courts to analyze claims challenging placement of trans women into isolation under heightened scrutiny to determine whether discriminatory

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24 *See* Smith v. City of Salem, 378 F. 3d 566, 571 (6th Cir. 2004); Glenn v. Brumby, 663 F. 3d 1312 (11th Cir. 2011); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1120 (N.D. Cal. 2015).

25 *Smith*, 378 F. 3d at 573.

26 *See* Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006).

27 *Id.*

28 *Glenn*, 663 F. 3d at 1318; *Norsworthy*, 87 F. Supp. 3d at 1111.

segregation practices further an important government interest in a way that is substantially related to that interest. In the words of Justice O'Connor, "[t]he purpose of requiring [intermediate scrutiny] is to assure that the validity of a [gender-based] classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[29]

Part I of this Note will provide the history, science, and sociology behind transgenderism, as well as information on the exact nature of the struggles that trans women face in male prisons and the realities of solitary confinement. Part I will also discuss approaches and policies of various jurisdictions towards transgender inmates. Furthermore, it will provide the standard of judicial review for transgender discrimination cases in the United States prior to *Price Waterhouse* and offer rationale for recognizing transgender individuals as a protected class subject to intermediate scrutiny under the Equal Protection clause. Part II will discuss *Price Waterhouse* and the way it affects transgender discrimination litigation across the country and argue why it should not remain the dominant framework used by courts to extend rights to transgender individuals. Furthermore, Part II will also analyze the split that followed the decision in *Schroer* to determine whether expansion of Judge Robertson's treatment of transgender discrimination as sex discrimination *per se* provides a successful framework for Equal Protection litigation. Part III will provide recommendations for eliminating narrow sex and gender constructs in the legal world, as well as safe and sensible options for housing transgender inmates that do not include protective custody or placement into the general population opposite of their self-identity.

Ultimately, this Note concludes that *Price Waterhouse* inherently misunderstands the nature of transgenderism because its logic does not apply equally, or at all, to those who identify as transgender, and it does not challenge the existence of the socially-imposed binary sex/gender system. While the logic in *Schroer* does not remedy the issue, following Judge Robertson's path of recognizing the complexities of sex and gender, and treating transgender discrimination as sex discrimination, will enable male-to-female (MTF) inmates to challenge their placement in solitary confinement under heightened scrutiny.[30]

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29 Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982).

30 *See Schroer*, 424 F. Supp. 2d at 212–13.

BACKGROUND

Bending Gender: Understanding Transgenderism

Laymen, as well as many legal professionals, use the terms "gender" and "sex" interchangeably. Yet, it is important to distinguish the two. The term "sex" refers to a person's biology, which, contrary to popular belief, extends beyond male and female.[31] "Intersex" is a general term used to describe individuals born with sexual anatomy that is neither fully female nor male.[32] For example, a child is intersex if born with typical female genitalia and internal testes.[33] Some individuals are born with XY chromosomes, yet retain a typical female body.[34] Additionally, there are "sex" chromosomes beyond the widely known XX and XY, such as XXY.[35] Some children are born with an enlarged clitoris and a shallow or absent vagina or a small penis and an opening in the scrotum that may resemble a vagina.[36] When faced with ambiguous genitalia, doctors, not nature, decide the sex of the child, oftentimes followed by an early genital-normalizing surgery.[37] The child grows up with the assigned sex and gender identity, often unaware of his or her condition.[38] As a result, some intersex children will later reject their assigned gender.[39] Understanding that sex does not exist in "black and white" is vital when considering claims of sex discrimination because despite not being as diverse as gender, "sex" should be read beyond male and female and grant protection to those that fall in between.

The term "gender" refers to characteristics culturally associated with a person's biological sex.[40] "Gender identity" refers to a person's "internal . . . sense of being either male or female, or something other or in between."[41] Gender identity is an internal experience not visible to others.[42]

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31 INTERSEX SOCIETY OF NORTH AMERICA, *What is Intersex?*, http://www.isna.org/faq/what_is_intersex (last visited Oct. 26, 2016).

32 *Id.*

33 Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 63 (2006).

34 *Id*.

35 *Id*. at 63–64.

36 *Id.* at 63.

37 *Id*. at 66.

38 *Id*. at 65.

39 Tamar-Mattis, *supra* note 33, at 74–75.

40 JAMISON GREEN, *Introduction to Transgender Issues*, *in* TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 1, 2 (2012).

41 *Id.* at 3.

42 *Id.*

In contrast, a person's "gender expression" is readily observed by others and consists of socially defined characteristics and behaviors associated with masculinity or femininity.[43] A person's gender expression may or may not be consistent with socially prescribed gender roles and is not always reflective of a person's gender identity.[44]

For most people, their gender identity is congruent with the sex assigned at birth (i.e., a person born with a female body has a female gender identity). However, some individuals do not experience congruency between their gender identity and expression and their physical traits. People who experience this have been called "transgender."[45] Persons included under the "transgender umbrella" are those that are labeled: pre-operative, post-operative, and non-operative transsexuals, cross-dressers, intersexed individuals, androgynous men and women, and genderqueer people.[46] Other words for transgender include "gender variant," "gender different," and "gender non-conforming."[47]

While there are numerous identities that fall within the transgender spectrum, transgender individuals may be divided into three categories. On one end of the spectrum, there are "transsexuals," individuals with gender identity opposite to their biological sex.[48] Until recently, transsexualism was classified as a "gender identity disorder" ("GID").[49] However, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) renamed GID to "gender dysphoria" and moved it out of the sexual disorders category into a category of its own.[50] Now, "gender dysphoria" is a diagnosis used by mental health professionals to describe people who experience significant distress with the sex and gender they were assigned at birth.[51] The name change and declassification of GID as a pathological disorder helps deconstruct the binary notions of gender where identities outside of masculine and feminine are deemed abnormal.[52] In addition, DSM-V recognizes that the distress component of gender dysphoria results from ostracism and discrimination suffered by transgender

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43 *Id.* at 3.

44 *Id.* at 3–4.

45 *Id*. at 4–5.

46 GREEN, *supra* note 40, at 3.

47 *Id.* at 4.

48 Male-to-female transsexuals ("MTF") are biological males who identify as females. Female-to-male transsexuals ("FTM") are biological females who identify as males.

49 *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000).

50 AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

51 *Id.*

52 *Id.* at 814.

individuals and is not an inherent part of transgender identity.[53] Many, but not all, transsexuals seek hormone therapy and sex-reassignment surgery to align their physical characteristics with their gender identity.

In the middle of the trans people spectrum are "transgender" individuals, whose appearance, personal characteristics, or behaviors fall outside the traditional notions of male and female.[54] The term "transgender" attempts to encompass a broader range of gender non-conforming people than the term "transsexual" and thus includes non-operative transsexuals, cross-dressers, drag queens, intersex people, and genderqueer people.[55]

At the opposite end of the spectrum from transsexuals are "gender-variant people," also known as gender non-conforming individuals such as androgynous men and women.[56] Those individuals still identify with their biological sex, but are perceived to be "masculine women" and "feminine men," thus still suffering stigma and discrimination for failure to conform to societal stereotypes.[57]

Me, Myself, and I: Overview of Solitary Confinement

Solitary confinement is a condition of "extreme isolation and deprivation" that has been used by prison administrators since the 1600s.[58] While solitary confinement is imposed on inmates for a variety of reasons, including rehabilitation and protection, many prison administrators view the practice as an effective way to maintain order and discipline inside their prisons.[59] The rationale behind the effectiveness of solitary confinement is rooted in a human predisposition to seek out companionship.[60] Once in prison, inmates lose many basic privileges available to an average person.[61] Because human contact is one of the very few privileges inmates retain in prisons, prison administrators reason that inmates feel compelled to follow prison rules and standards when faced with the risk of losing that privilege.[62] Inmates' fear of solitary confinement is understandable, for the devastating effect of solitary confinement on the human psyche and body is

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53 *Id.* at 458.

54 *See* GREEN, *supra* note 40, at 4.

55 *Id.* at 3.

56 *Id.* at 4.

57 *Id.*

58 Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 4 (2006).

59 *Id.* at 2.

60 *Id.*

61 *See id.* at 3.

62 *See id.*

well-documented.[63] While incarceration in itself is isolating and harmful to human social development, solitary confinement features components that make general incarceration look like a stay in the Hamptons. Solitary confinement cells are designed to allow minimal human contact, often being the size of an average bathroom with solid steel doors and devoid of personal possessions, books, and windows.[64] Inmates in solitary confinement spend an entire day alone, with an hour or two reserved for showering or recreational activities, both still done in isolation.[65] Those inmates are also denied educational and vocational opportunities offered to inmates in most prisons.[66] They are prohibited from watching television, listening to radio, or reading newspapers and books.[67] Inmates in isolation experience "extreme anxiety, hallucinations, violent fantasies, hypersensitivity to external stimuli, and increased tendency to inflict self-harm."[68]

With no federal laws regulating the use of solitary confinement, prison administrators exercise a wide range of discretion in determining when and for how long an inmate is isolated.[69] The decisions and policies of correctional authorities also enjoy much deference from the judicial branch, which makes it extremely difficult for inmates placed in solitary confinement to successfully challenge their confinement under constitutional standards.[70]

Solitary Confinement and Transgender Women

Non-gender conforming and transgender individuals are more likely than others to be put into protective custody or solitary confinement.[71] In some instances, MTF inmates request to be segregated. Given the discussion above about the horrors of solitary confinement, one can imagine how serious the circumstances must be to lead to such requests.[72] The requests usually stem from fear of being violated and belief that isolation will protect them.

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63 *See id.*

64 Hresko, *supra* note 58, at 3.

65 *See id.* at 4–5.

66 *Id.*

67 *Id.*

68 *Id.* at 7.

69 *Id*. at 10.

70 Hresko, *supra* note 58, at 10.

71 Gabriel Akers, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 9 DUKEMNIRIER AWARDS 343, 372.

72 *Id.* at 372.

However, some transgender people are placed into solitary confinement against their will, for their own alleged safety. Some prisons have policies that dictate that victims of violent attacks must be placed in involuntary protective custody.[73] These policies, helpful at a glance, do nothing more than punish victims of violence and deter them from reporting instances of abuse and violence they experience. Such policies have a disproportionate impact on transgender intimates, especially MTF individuals in male prisons.[74] Ostracism felt by transgender individuals in daily life is intensified in male prisons due to their hyper-masculinized environments,[75] where men are denied dominance and power, traits associated with masculinity. There, they are stripped of their identity, given a number, and must depend on prison authorities for the provision of their most basic needs. As a result, prisoners turn to the one thing that has been used throughout centuries to establish dominance and exert power—sexual violence.[76] In such settings with rigid gender roles and constant need to assert dominance, prisoners displaying "feminine" traits are more likely to be victimized.[77] However, rather than developing effective policies aimed at assigning transgender individuals to prisons that match their gender identity and/or appearance, many prison authorities give MTF inmates a choice to enter into administrative segregation or force them into it automatically.[78]

Aside from being punished for being victims of violence, transgender individuals are often targeted and disciplined for possessing make-up products, female or male underwear, and clothing. On top of being disciplined for their failure to conform to the required dress code, transgender inmates are often targeted and written up for minor infractions that land them in solitary confinement simply because of the prison staff's prejudice.[79]

Housing and Management of Transgender Inmates Across Various Jurisdictions

An empirical study done by Sydney Tarzwell analyzed prison and jail practices and policies in regards to trans inmates in forty-four states.[80] Only

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73 *Id.* at 374.

74 *Id.*

75 *Id.*

76 Tarzwell, *supra* 10, at 172.

77 Jordan Mintz, *Treatment of Transgender Inmates—The Double punishment*, SETON HALL L. REV. 1 (2013).

78 *Id.* at 10.

79 Akers, *supra* note 71, at 374.

80 Tarzwell, *supra* note 10, at 180.

seven states[81] had policies aimed at assessing and managing transgender inmates.[82] However, the content of the written policies in those seven states are lackluster when it comes to providing sensitive, inclusive, and safe placement options for trans inmates.[83] One common theme among the written policies of the seven states is the narrowly defined group of transgender inmates that are covered by those policies.[84] The policies largely target only inmates who are diagnosed with GID and do not take into consideration genderqueer and non-gender conforming inmates.[85] Furthermore, those policies often take away their freedom to self-identify and have medical and prison staff determine who is covered by the policies and where they should be placed.[86] The very use of the word "freedom" may seem ironic in a prison setting, but transgender individuals have been forced into assigned sex and gender expectations from birth and their very existence is an act of rebellion against the binary sex and gender system in our society. Taking away their ability to self-identify only silences them further.

Most of the states analyzed did not have any written policies. For example, Arkansas does not have any written policies aimed at managing transgender prisoners and is strictly genitalia-based.[87] An individual who starts transitioning by hormone treatment or top surgery, but still has a penis will be placed in a male prison.[88] Furthermore, due to increased awareness of sexual violence through the Prison Rape Elimination Act, a prisoner who appears transgender to prison staff will be automatically placed into administrative segregation.[89]

Some states place MTF inmates into general population unless an incident arises that would justify their placement into protective custody.[90] This practice is toxic because rather than developing policies to assess the needs and vulnerabilities of transgender inmates at the intake level, prison authorities are gambling with the inmates' safety and risking their well-being by waiting for them to be victimized.[91]

Currently, the city of Denver has developed a transgender jail policy

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81 The states with written policies in regards to transgender prisoners are Alabama, Colorado, Pennsylvania, Idaho, Minnesota, and Michigan. *Id.* at 198–203.

82 *Id.* at 195.

83 *See generally id.* at 195–203.

84 *Id.* at 198–204.

85 *Id.*

86 Tarzwell, *supra* note 10, at 203.

87 *Id.*

88 *Id.* at 204.

89 *Id.*

90 *Id.* at 193.

91 *Id.*

that is effective and should be used as a national model. It allows detainees to self-identify and indicate their housing preference.[92] The policy strives to better the relationship and understanding between the detainees and the prison staff.[93] At the intake level, transgender inmates have a choice to fill out "a statement of preference form, including a preferred name and preferred pronouns, regardless of legal name change or whether they've undergone gender-reassignment surgery."[94] After booking, such inmates are then placed into segregation for seventy-two hours while a "transgender review board" recommends where to assign the inmate.[95] Unlike review and committee boards of states with written policies, the Denver board takes into consideration "psychological factors that may contribute to either the individual's resiliency or vulnerability," and allows the inmate to refuse an anatomy check.[96] Furthermore, the board is allowed to consult with a transgender individual or an informed ally to make the best possible decision and recommendation for housing.[97] However, the required inclusion of transgender activists and allies on the board would be preferable to mere freedom to consult them when needed. Active involvement of the transgender community on the board will make it less likely that recommendations and housing assignments will be done out of ignorance and bias.

Denver's sensible policy respects the gender identities of trans inmates and their privacy by allowing them to take private showers, request to be housed with other trans inmates, and request a male or female guard to perform strip searches.[98] Furthermore, Denver jail authorities did not stop at written policies, but incorporated sensitivity training for the jail employees and taught them the importance of gender identity and proper vocabulary when addressing inmates.[99]

While Denver jail authorities take requests of the inmates into consideration, certain criminal activities automatically deny requests of MTF inmates to be placed into female housing.[100] For example, an MTF inmate with male genitalia and a criminal history that includes crimes of a

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92 Jennifer Brown, *Denver Jail Transgender Policy a National Model*, DENVER POST (June 27, 2015, 1:42 PM), http://www.denverpost.com/news/ci_28395500/denver-jail-transgender-policy-national-model.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Transgender and Gender-Variant Inmates Department Order 4005.1*, DENVER SHERIFF DEP'T (June 6, 2012), http://static.nicic.gov/Library/026337.pdf.

97 *Id.*

98 *See* Brown, *supra* note 92.

99 *Id.*

100 *Id.*

sexual nature cannot be assigned to female housing for safety purposes.[101]

It is important to acknowledge that even though Denver has such a policy in place, many MTF inmates still request to be housed in male units.[102] This can be explained by the fact that many inmates are recidivists—coming back to a familiar prison where you are acquainted with the hierarchy and internal rules is easier than being thrust into an essentially unfamiliar environment of female prisons.[103]

Tried and False Methods

While cases featuring transgender litigants challenging housing assignments and the use of solitary confinement are few, many of those cases have been litigated under the Eighth Amendment but with no concrete luck.[104] As a general rule, the standard to hold prison authorities liable under the Eighth Amendment is deliberate indifference to excessive risks to the health or safety of prisoners.[105] "Serious deprivations of basic human needs, such as food, clothing, shelter, medical care, reasonable safety, warmth, exercise, hygiene, and sleep, can constitute violations of the Eighth Amendment."[106] Yet, even such serious deprivations might be found permissible if accompanied by adequate disciplinary justifications. The fact that the courts' do not view solitary confinement as cruel and unusual punishment substantially limits using the Eighth Amendment to challenge a transgender inmate's involuntary placement into isolation.

In *Meriwether v. Faulker*, a transgender woman challenged her placement into administrative segregation, which could have lasted well into the remaining thirty-years of her prison sentence.[107] Meriwether argued that placement into administrative segregation denied her the benefits enjoyed by other inmates, such as adequate living space, recreation, and educational and occupational opportunities.[108] While the Seventh Circuit did not find any merit to Meriwether's due process claim because lockdown restrictions do not implicate a liberty interest, the court entertained the possibility of an Eighth Amendment violation. The Seventh Circuit found that the district court erred in dismissing Meriwether's claim

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101 *Id.*

102 *Id.*

103 *Id*.

104 Nikko Harada, *Trans-Literacy Within Eighth Amendment Jurisprudence: De/Fusing Gender and Sex*, 36 N.M.L. REV. 627, 633–38 (2006).

105 Akers, *supra* note 71, at 375.

106 *Id.* at 376.

107 Meriwether v. Faulkner, 821 F. 2d 408 (7th Cir. 1987).

108 *Id.* at 416.

as a matter of law and remanded the case to ascertain actual conditions of Meriwether's confinement and any feasible alternatives.[109] However, the Seventh Circuit's analysis of Meriwether's Eighth Amendment claim expressed some skepticism with regard to deliberate indifference by the prison authorities towards the inmate.[110] Meriwether alleged that she suffered several assaults at the hands of the staff and other inmates in both general population and segregation.[111] The court noted that "[p]laintiff's claim that the defendants have deliberately failed to protect her from sexual assault is somewhat in conflict with her desire not to remain in administrative segregation indefinitely."[112] It is disturbing that the Seventh Circuit viewed Meriwether's desire to be free from sexual assault as conflicting with the desire to be free from solitary confinement, especially in light of allegations that both inmates and staff were the perpetrators.

Very few courts considered Equal Protection implications underlying the policies that place transgender inmates into solitary confinement.[113] In *Tates v. Blanas*, a transgender woman challenged Sacramento County Jail's policy of placing all transgender detainees in total separation (T-Sep) throughout their entire jail sentence.[114] Defendant prison officials argued that all transgender detainees were placed in T-Sep solely because they were transgender and the defendants were afraid that if the detainees were assigned to general population or less restrictive separation, they might be harmed and the defendants would be held liable.[115] Despite initially assuming that the policy was an appropriate means of securing the safety of detainees, the court conducted a genuine analysis of the situation in light of the additional evidence.[116] What changed the court's mind to make them look more closely?

First, the court reviewed differences between T-Sep inmates and the general population and found that T-Sep detainees are deprived of many benefits available to other inmates.[117] For example, T-Sep detainees had to be shackled during transport, were prohibited from group worship or religious services, and were not allowed any communication with other

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109 *Id.* at 417.

110 *Id.*

111 *Id.*

112 *Id.*

113 *See* Medina-Tejada v. Sacramento Cty., No. CIV. S-04-138, 2006 U.S. Dist. LEXIS 7331 (E.D. Cal. Feb. 24, 2006); Tates v. Blanas, No. CIV S-00-2539 OMP P, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. Mar. 6, 2003).

114 *Tates*, 2003 U.S. Dist. LEXIS 26029, at *1.

115 *Id.* at *9.

116 *Id.* at *12.

117 *See id.* at *11–*22.

inmates.[118] Furthermore, they were provided rooms less sanitary than those available to other inmates with no means to keep them clean and had limited access to showers, phones, and recreational rooms.[119] The court also discussed other forms of discriminatory treatment, stemming directly from Tates' gender identity, such as denying Tates' access to female undergarments, sexual assault, and verbal harassment.[120]

Without explicitly calling attention to it, the court conducted "an Equal Protection analysis by comparing treatment of transgender inmates with the treatment of similarly situated non-transgender detainees."[121] Ultimately, the court ruled against the defendants and ordered them to create a new classification scheme that would not discriminate against transgender detainees.[122] The court held that the defendants may not deprive transgender detainees of benefits enjoyed by others simply because of bias against transgender individuals.[123] The court further noted in dicta that segregation of transgender inmates is not always required and that the duty to protect transgender detainees from harm may not be used to justify actions not reasonably related to accomplishing that purpose.[124]

However, *Tates*' stands alone in its decision. Other claims brought under the Equal Protection Clause of the Fourteenth Amendment were unsuccessful because they were reviewed under rational basis, as transgender individuals are not recognized as a suspect class, entitled to heightened review.[125] Prison officials easily meet the standard of "rationally related to a legitimate government interest" by alleging that putting MTF inmates in the general population would pose a significant threat to security in general, and to the MTF inmate specifically.[126]

As discussed above, placing transgender inmates into administrative segregation or solitary confinement does not protect them from private abuse at the hands of the prison staff. Furthermore, the psychological effects of isolation, inadequate hygiene and living conditions, and the deprivation of basic human contact and amenities available to other prisoners hardly rationalizes a government interest that is not as legitimate as it may seem.

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118 *Id.* at *18.

119 *Id.* at *15,*16,*20,*21.

120 *See* Tates v. Blanas, No. CIV S-00-2539 OMP P, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. Mar. 6, 2003), at *15,*16,*20,*21.

121 Akers, *supra* note 71, at 382.

122 *Tates*, 2003 U.S. Dist. LEXIS 26029, at *28–*29.

123 *Id.* at *27.

124 *Id.* at *27–*28.

125 *See, e.g.*, DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183 (D. Wyo. 2004); Lopez v. City of New York, No. 05 Civ. (NRB) 10321, 2009 WL 229956, at *39 (S.D.N.Y. Jan. 30, 2009).

126 *See* Estate of DiMarco v. Wyo. Dep't of Corr., 473 F. 3d 1334 (10th Cir. 2007).

Transgender Discrimination Jurisprudence

Pre-*Price Waterhouse* Transgender Discrimination Claims

Prior to the Supreme Court's ruling in *Price Waterhouse v. Hopkins*, courts throughout the country refused to recognize transgender discrimination under the "sex discrimination" framework of the Equal Protection clause, Title VII, or other similar anti-discrimination laws because the term "sex" did not extend to cover gender discrimination.

In *Holloway v. Arthur Anderson & Co.*, which set the precedent for other similar decisions across various jurisdictions, the Ninth Circuit found that transsexuals were not a suspect class for Equal Protection purposes because they did not make up a "discrete and insular minority," nor did they possess "immutable characteristics determined solely by the accident of birth."[127] The Ninth circuit did not engage in the statutory interpretation analysis of "sex" of Title VII, satisfied with its finding that Congress has not shown any intent other than to limit the term "sex" to its traditional meaning.[128] The court reasoned that should the appellant claim discrimination because of her sex, she would have a cause of action under Title VII, but the appellant in *Holloway* made a voluntary choice to alter her birth sex, an act not protected under Title VII.[129]

Some courts held more specifically that "sex" refers to biological or anatomical characteristics, "whereas the term 'gender' refers to an individual's sexual identity" or socially-constructed characteristics.[130] These early transgender discrimination cases demonstrated that transgender individuals were denied protection because they were victims of "gender," rather than "sex" and somehow courts found it to be permissible.[131] Transgender activists and allies needed to find a way for courts to consider gender discrimination before transgender individuals could be protected by the law as a suspect class. The solution came in the form of *Price Waterhouse v. Hopkins*.

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127 Holloway v. Arthur Andersen & Co., 566 F. 2d 659, 659 (9th Cir. 1977).

128 *Id.* at 663.

129 *Id.* at 664.

130 *See* Dobre v. Nat'l R.R. Passenger Corp. (Amtrak), 850 F. Supp. 284, 286 (E.D. Pa. 1993); Ulane v. E. Airlines, Inc., 742 F. 2d 1081, 1087 (7th Cir. 1984).

131 *See* Ulane v. E. Airlines, Inc., 742 F. 2d 1081, 1087 (7th Cir. 1984).

ANALYSIS

Price Waterhouse

The *Price Waterhouse* plaintiff, Ann Hopkins ("Hopkins"), was a female associate and a contender for a partnership at the firm, for which she was not selected.[132] Despite Hopkins' qualifications, the alleged reason was her "aggressiveness" and lack of interpersonal skills.[133] However, the Supreme Court detected undertones of sexism in the comments of her evaluators, who described Hopkins as "macho" and stated that she "overcompensated for being a woman."[134] Hopkins' male evaluator advised that she could improve her chances of partnership at the firm if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[135] The Court found those comments to play into the existing gender stereotypes of how a woman should act and as part of the motive behind passing Hopkins over for a partnership at the firm.[136] If gender is just one of the motivating factors behind a decision negatively affecting an employee, it constitutes actionable discrimination.[137] In the ruling for Hopkins, the Court held that Title VII reaches claims of sex discrimination based on "sex stereotyping," a notion unheard of in the past.[138]

Price Waterhouse Aftereffect

In light of *Price Waterhouse*, circuit courts across the country applied the gender discrimination framework set out in *Price Waterhouse* to grant protection to transgender individuals. The Ninth Circuit in *Schwenk v. Hartford* overturned the precedent set out in *Holloway*.[139] Schwenk, a pre-operative MTF transsexual, was assigned to a male prison where Robert Mitchell ("Mitchell") was employed as a guard.[140] Schwenk's alleged that there were several instances of Mitchell subjugating her to unwanted sexual advances and harassment, which escalated to sexual assault.[141] Schwenk

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132 Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989).
133 *Id.* at 234.
134 *Id.* at 235.
135 *Id.*
136 *Id.* at 236.
137 *Id.* at 240.
138 Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
139 Schwenk v. Hartford, 204 F. 3d 1187, 1201 (9th Cir. 2000).
140 *Id.* at 1189.
141 *Id.*

sought damages for suffering a psychological injury resulting from Mitchell's attempted rape under Gender Motivated Violence Act ("GMVA").[142] Mitchell argued that even if GMVA applied to men, it did not apply to transsexuals because transsexuality is not an element of gender but a psychiatric illness.[143] The court disagreed, finding that GMVA parallels Title VII by both statutes prohibiting discrimination based on sex and gender.[144]

The Ninth Circuit then applied the framework set out in *Price Waterhouse*, which dictated that gender did not need to be the motivating factor behind discrimination, but only a part of it.[145] The court directly relied on *Price Waterhouse* to establish that Mitchell's actions were motivated, at least partially, by Schwenk's feminine gender expression, since he did not begin harassing Schwenk until he discovered her transsexuality.[146]

In *Smith v. City of Salem*, appellant Smith was employed by Salem's Fire Department for seven years before she was diagnosed with GID.[147] In accordance with medical protocol that required an individual with GID to present and live full-time under their gender identity, Smith began expressing her female identity in daily life, including her workplace.[148] Faced with comments from her co-workers about her "not masculine enough" appearance, Smith informed her supervisor about her GID diagnosis, designed treatment, and Smith's eventual complete transition from male to female.[149] Smith then alleged that her supervisor and other superiors conspired to fire her based on her transsexualism.[150]

On review, the Sixth Circuit of Appeals reversed the district court's dismissal, finding that precedent set out in *Holloway*, *Ulane*, and others "has been eviscerated by *Price Waterhouse*."[151] The court reasoned that similar to an employer who discriminates against a female employee who does not wear dresses, an employer who "discriminate[s] against men because they *do* wear dresses and makeup . . . [is] also engaging in sex discrimination . . . [which] would not occur but for the victim's sex."[152]

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142 *Id.* at 1194.

143 *Id*. at 1200.

144 *Id*. at 1202.

145 Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

146 *Id*. at 1201; *see also* Norsworthy v. Beard, 74 F. Supp. 3d 1110, 1114 (N.D. Cal. 2014); Glenn v. Brumby, 663 F. 3d 1312, 1317 (11th Cir. 2011).

147 Smith v. City of Salem, 378 F. 3d 566, 568 (6th Cir. 2004).

148 *Id.*

149 *Id*.

150 *Id.*

151 *Id.*

152 *Id*. at 576.

"[D]iscrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."[153] The Sixth Circuit opined that sex stereotyping based on a person's gender non-conformance is impermissible regardless of the reason for such behavior.[154]

The framework established in *Price Waterhouse* and the resulting case law does not allow transgender plaintiffs to prevail on the grounds that they were discriminated against as transgender women or men. Rather, transgender plaintiffs prevail as gender non-conforming men or women. Under this framework, transgender individuals have a cause of action in court only if they "anchor" their claim in an outdated notion that there are only two biological sexes from which their behavior deviates.[155] The courts following the footsteps of *Price Waterhouse* and *Salem* do not treat transgender status as a separate suspect class.[156]

This problematic, narrow nature of *Price Waterhouse's* framework is apparent in recent cases that refuse to recognize transgender individuals as a protected class because their claims do not fit an expected model. In *Johnston v. University of Pittsburgh*, Johnston brought an action under Title IX alleging that the defendants discriminated against him because of his sex and his transgender status by prohibiting him from using restrooms and locker rooms designed for men only.[157] The district court found that the policy of segregating bathrooms by sex at birth did not violate Title IX because trans discrimination is not sex discrimination.[158] The court rejected plaintiff's arguments based on *Smith v. City of Salem* and the resulting case law reasoning that those cases do not treat transgender status in and of itself as a suspect classification, but only deal with sex and gender stereotyping discrimination claims, which Johnston failed to allege.[159]

Similarly, in *Etsitty v. Utah Authority*, the Tenth Circuit Court of Appeals outright rejected the plaintiff's argument that Title VII grants transsexuals protected status.[160] Curiously enough, the court recognized the

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153 Smith v. City of Salem, 378 F. 3d 566, 575 (6th Cir. 2004).

154 *Id*.

155 The fact that the court in *Smith v. City of Salem* continued to refer to Smith by male pronouns further showcases ignorance of some courts when it comes to understanding the biological and social reality behind transgenderism. *See generally Smith*, 378 F. 3d at 566.

156 *See* Glenn v. Brumby, 663 F. 3d 1312, 1312 (11th Cir. 2011); Norsworthy v. Beard, 74 F. Supp. 3d 1110, 1114 (N.D. Cal. 2014).

157 Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 657 (W.D. Pa. 2015).

158 *Id*. at 670.

159 *Id.*

160 Etsitty v. Utah Transit Auth., 502 F. 3d 1215 (10th Cir. 2007).

scientific complexities behind sex and gender but declined to address them on the issue at hand.[161] Instead, the court allowed the plaintiff's alternative claim that she was a biological male who was discriminated against for gender non-conformity, but denied relief nonetheless.[162] The court reasoned that as extensive as *Price Waterhouse*'s rationale might be, using a specific restroom does not constitute a failure to conform to sex stereotypes the way of dressing, acting, and talking does.[163]

The shortcomings of *Price Waterhouse* as applied to transgender individuals should be obvious. Protecting Hopkins' refusal to conform to gender stereotypes and right to express herself at the workplace allowed other people to exist free of punishment for failure to act like their perceived sex. However, Hopkins' actions did not require "reconsideration of the biological fundamentality of binary sex categories."[164] What Hopkins did was ask for equal treatment not hindered by archaic notions of how a woman or man should act.[165] When transgender plaintiffs bring claims under the sex-stereotyping theory, their justice is hinged on their ability to argue that they are no different than Hopkins—a biological woman who identifies as a woman and has the right to express behaviors inconsistent with her sex.[166] It is indeed a great irony that transgender people, who by their very existence invalidate the authority and validity of socially and medically-inscribed gender and sex categories, are forced to embrace them in order to get protection of the law.

Moreover, the *Price Waterhouse* framework is unlikely to be applicable to solitary confinements in prisons. Most cases where transgender plaintiffs prevailed dealt with discrimination in the workplace where employers treated their transitioning workers with animosity for failing to conform to gender stereotypes of men and women.[167] Transgender inmates, on the other hand, get placed into administrative segregation for often unfounded security purposes solely because they are transgender.

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161 *Id*. at 1225.

162 *Id.* at 1224.

163 *Id.*

164 Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY GENDER L. & JUST. 83, 101 (2008).

165 *Id.* at 101.

166 *Id*.

167 *See generally* Glenn v. Brumby, 663 F. 3d 1312, 1312 (11th Cir. 2011); Smith v. City of Salem, 378 F. 3d 566, 566 (6th Cir. 2004).

Schroer v. Billington: *Salvation?*

Plaintiff Schroer applied for a position with the Congressional Research Service ("CRS"), for which she was highly qualified for.[168] As a biological male, Schroer was diagnosed with GID and began her transition while she was in the hiring process.[169] Upon receiving an offer with the CRS, Schroer explained to the CRS representative that she was receiving medical treatment for gender dysphoria, which required presenting herself as a female in every aspect of her life. Schroer intended to do just that when she started working for CRS.[170] Upon learning that, the representative withdrew her offer to hire Schroer, explaining that given the circumstances, Schroer would not be a good fit at CRS.[171] Schroer filed a suit, alleging that CRS withdrew the offer either because (1) it perceived Schroer to be a man who did not conform with gender stereotypes associated with men or (2) it perceived Schroer to be a woman who did not conform with gender stereotypes associated with women in our society.[172]

In his 2006 decision denying CRS' motion to dismiss, Judge Robertson recognized that protection of masculine women and effeminate men under *Price Waterhouse* is "different, not in degree, but in kind" from protection of men and women who perceive themselves as someone other than their assigned sex at birth.[173] Unlike the plaintiff in *Price Waterhouse,* Schroer did not "wish to go against the gender grain, but with it."[174] "Schroer . . . [did not seek] acceptance as a man with feminine traits. She [sought] to express her female identity, not as an effeminate male, but as a woman."[175] Judge Robertson's explicit recognition that Schroer was a woman embraced the notion that transgender individuals belong to the sex with which they identify themselves. Judge Robertson concluded that CRS' decision was not influenced by gender stereotypes, but by intolerance for those whose gender identity does not match their genitalia.[176]

In a surprising move, Judge Robertson then held that while Schroer does not have a cause of action under *Price Waterhouse*, she is not precluded from protection under Title VII as a transsexual.[177] In his

168 Schroer v. Billington, 424 F. Supp. 2d 203, 205 (D.D.C. 2006).
169 *Id*. at 205–06.
170 *Id*. at 211.
171 *Id*. at 223.
172 *Id*. at 210.
173 *Id*. at 210, 225.
174 Schroer v. Billington, 424 F. Supp. 2d 203, 211 (D.D.C. 2006).
175 *Id*. at 210–11, 232.
176 *Id*. at 211.
177 *Id.*

reasoning, Judge Robertson criticized one of the pre-*Price Waterhouse* seminal cases on transgender discrimination, *Ulane v. Eastern Airlines* for its outdated and narrow reading of the word "sex" in Title VII.[178] In *Ulane*, an MTF plaintiff ("Ulane") was discharged by the airline company after undergoing sex-reassignment surgery.[179] The district court decision, penned by Judge Grady, held that because "sex is not a cut-and-dried matter of chromosomes," the term "sex" in Title VII extended to "sexual identity."[180] The term "sex" "literally and . . . scientifically" applies to transsexuals.[181] The Seventh Circuit overruled the district court's decision, relying on legislative history behind the passage of Title VII.[182] According to the Seventh Circuit, the lack of legislative history supporting the "sex" amendment and its last minute addition to the bill demonstrated that Congress never considered nor intended for the word "sex" to apply to anything other than its ordinary meaning and does not extend to transsexuals.[183] The court rationalized that if the airline perceived Ulane as a female and discriminated against her because she was a female, Ulane would have a cause of action under Title VII.[184] However, the airline discriminated against Ulane because she was a transsexual individual—a class that does not enjoy the protections of Title VII.[185]

Judge Robertson, noting that twenty years have passed since the decision in *Ulane*, reasoned that the Supreme Court decisions subsequent to *Ulane* "have applied Title VII in ways Congress could not have contemplated."[186] One stark example would be *Oncale v. Sundowner Offshore Services, Inc.,* where Justice Scalia wrote for a unanimous court that

> Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[187]

Robertson did not give much weight to legislative inaction to include

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178 *Id*. at 212, 233.

179 Ulane v. E. Airlines, Inc., 742 F. 2d 1081, 1084 (7th Cir. 1984).

180 Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 824 (N.D. Ill. 1983).

181 *Id.* at 825.

182 *Ulane*, 742 F. 2d at 1085.

183 *Id*.

184 *Id*. at 1087.

185 *Id.*

186 Schroer v. Billington, 424 F. Supp. 2d 203, 203 (D.D.C. 2006).

187 *Id.* at 212.

or exclude discrimination based on sexual identity, reasoning that a forty-year-old silence is just that—silence.[188] Instead, he agreed with Judge Grady's approach to treat transgender discrimination as sex discrimination, noting that such an approach is a "straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and in turn, with social, psychological, and legal conceptions of gender."[189]

Judge Robertson revisited his decision in the 2008 opinion and came to the same conclusion. Judge Robertson analogized Schroer's situation with an employee being discharged for converting from Christianity to Judaism.[190] In that hypothetical, the employer's bias towards "only converts" and not Christians or Jews would still be interpreted as discrimination because of religion.[191] No courts would accept the notion that discrimination "because of religion" would not encompass religious converts.[192] In cases of transgender discrimination, the courts continue to focus on the label "transsexual" and ignore the statutory language itself. [193]

In the three years that have passed since Judge Robertson denied CRS the motion to dismiss, CRS has unsuccessfully argued that transsexuals are not currently covered by Title VII because of the recent bills introduced to the House of Representatives to ban sexual orientation and gender discrimination in employment.[194] Rather than interpreting the non-passage of the bills as a sign that Congress was content with a narrow interpretation of "sex," Judge Robertson agreed with Schroer that non-passage might also indicate that the statute requires, not an amendment, but a proper interpretation.[195]

Towards a More Expansive Approach to Sex and Gender

Judge Robertson's understanding of the distinction between gender non-conforming men and women, transgender individuals, and his recognition of the need to protect the latter is comforting. However, it is unclear whether his decision called for a creation of a separate class under

188 *Id.*
189 *Id.* at 212–13.
190 Schroer v. Billington, 577 F. Supp. 2d 293, 304 (D.D.C. 2008).
191 *Id.* at 305.
192 *Id.* at 306.
193 *Id.*
194 *Id.*
195 *Id.* at 308.

sex discrimination or for recognition that "sex" encompasses a population beyond "male" and "female." If it is the former, there is a question of whether a separate class will even solve the problems transgender people deal with currently. If *Schroer* establishes transsexuals as a third protected class, it will challenge the binary sex/gender system. However, the third class will protect only people like Schroer, i.e. individuals diagnosed with GID, intending to undergo sex reassignment surgery. Such classification will exclude many others who also fall under the "transgender umbrella" and experience discrimination across all areas of our society, from workplace to prisons. Pre-operative transsexuals, transgenders, cross-dressers, genderqueers, etc., are the ones who challenge the cissexist notions of sex and gender *the most* because they do not undergo medical procedures in order to present themselves as a man or a woman and are often more visible than "passing" post-op transsexuals. Those people will still remain victimized by the justice system and society.

There has been a push for creating a "gender identity" or "gender expression" class under sex discrimination in order to extend protection to not just "passing" post-operative transsexuals, but the rest of the persons under the "trans umbrella." However, creating a "gender identity" class will essentially create a spectrum where every other identity falls someplace between the normative man and woman. Like a "transsexual" category, a "gender fluid" category will continue perpetuating the binary sex/gender notions and "othering" individuals who are not female or male.

It is more likely that Judge Robertson called for interpreting "sex" beyond male and female since he acknowledged that treating transgender discrimination as sex discrimination "was a straightforward way to deal with the factual complexities that underlie human sexual identity."[196] To avoid othering transgender and non-gender conforming individuals, while simultaneously challenging the binary sex system, a solution should consist of trans inclusivity to the level where trans individuals fit perfectly within the understanding of sex and gender; not occupy a small, capricious class where their existence is divided between two sides. Expanding the definition of "sex" in sex discrimination claims will include everyone who is being discriminated against based on their gender non-conforming appearance or identity. The only way to achieve that is to do away with the sex/gender distinction and recognize that sex is not a rigid, biological process that results only in males and females.

While society has come a long way to recognize the difference between gender and sex, the two are not as unrelated as they may seem.[197]

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196 Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

197 *See generally* ANNE FAUSTO-STERLING, SEXING THE BODY 110 (2000).

"The biology of sex is ambiguous. Anything one says . . . about the biology of sex . . . is already mediated by specific models that have gender constructs built into them."[198]

> [O]ur conception of sex is based on a lived biology which is constituted of our historical and cultural ideas." Anthropological studies have showed us that the cultural processes which create different identities for men and women are different from society to society. Gender identities are thus not similar in every cultural system. But gender is influenced by sex and sex is influenced by gender.[199]

It may be argued that gender is more rigid than sex.[200] Transgender individuals have a firm understanding of their gender identity and who they wish to be; the only problem lies in their biological body that can be surgically and hormonally altered to match their identity.[201] One might argue that despite undergoing sex-reassignment surgery and hormone treatments, transgender individuals are still "genetically male." However, reliance on chromosomes, hormones, and internal and external sex characteristics further undermines the notion that sex is binary and rigid.[202] Where would the law and science place a male with XXY chromosomes who appears biologically male, but whose genetic map contains two female chromosomes? Where would science place a non-operative transwoman, who has been on estrogen hormone treatment for years? Her genitals match a biological male but her hormones, which are just as much a part of her biological make-up as her genitalia, do not.

Furthermore, gender is a product of brain function and the brain is just as biological and tangible as external and internal sex organs. This begs the question—where and when does a person cease to be a member of one sex and become a member of the other? Courts across the country have yet to agree on a unified answer to this question. The attempt to answer this question is in the following section.

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198 Kari Helene Partapuoli, *Woman/Man as Cross Cultural Categories*: *The Sex/Gender Distinction With Reference To The So-called Third Sex*, http://www.partapuoli.com/Texts/Gender_ third_sex.htm (last visited Feb. 25, 2016).

199 *See id.*

200 *Id.*

201 *Id*.

202 FAUSTO-STERLING, *supra* note 197, at 110.

Is One Born a Woman or Becomes One?

The following analysis of case law differs from that in Part II because, rather than addressing whether transgender discrimination is sex discrimination, the cases below attempt to determine what makes a person "man" or "woman" in the eyes of the law.

Until recently, courts around the country refused to recognize even post-operative transsexuals as men or women for the purposes of opposite sex marriage. In *In re Declaratory Relief for Ladrach,* an Ohio court considered whether a post-operative MTF was permitted to marry a male.[203] The court declined the marriage application, reasoning that, despite sex-reassignment surgery and successfully presenting as a woman, the applicant at birth possessed only male characteristics and there was no evidence that the applicant's chromosomes were anything but male.[204] The Supreme Court in Kansas used similar reasoning to void a marriage involving post-operative male-to-female transsexual.[205] The court reasoned that

> [t]he words "sex," "male," and "female" in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to "produce ova and bear offspring" does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the Littleton court noted, the transsexual still "inhabits . . . a male body in all aspects other than what the physicians have supplied. J'Noel does not fit the common meaning of female. [citations omitted].[206]

Similarly, in *Kantaras v. Kantaras*, the court held that a marriage between a "biological" woman and a post-operative female-to-male transsexual was void *ab initio*.[207] The court, agreeing with the courts in Kansas and Ohio, reasoned that the common meaning of "male" and "female" in statutes governing marriage referred to immutable traits determined at birth.[208] While acknowledging that advances in medical

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203 *In re* Ladrach, 513 N.E. 2d 828 (Ct. Com. Pl. 1987).

204 *Id.* at 840.

205 Littleton v. Prange, 9 S.W. 3d 223 (Tex. Ct. App. 1999).

206 *Id.* at 228.

207 Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

208 *Id.* at 158.

science might warrant a change in the common meaning of "male" and "female", the court reserved the resolution of the issue to the legislature as a matter of public policy.[209]

The courts' refusal to see even post-operative transgender individuals as legally male or female for the purposes of opposite-sex marriage created an ironic loophole in the law. Their statutory interpretation of "man" and "woman" warrants a finding that the original sex at birth is the only determinative factor in the context of marriage. However, such logic also dictates that an individual born a woman, but who later transitioned into a man could technically marry another man despite the ban on same-sex marriage.[210]

In contrast, a court in New Jersey recognized the validity of the marriage involving a male-to-female transsexual.[211] The court reasoned that if an individual who underwent sex-reassignment surgery can function sexually as a female or male, there is "no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated."[212]

The disagreement between the courts in determining what makes someone a "man" or "woman" in the eyes of the law can be found in areas outside of marriage and public policy. A district court in D.C. recognized that a plaintiff, who underwent sex-reassignment surgery and became legally female, had a right not to be held in temporary custody with males.[213] In *Shaw v. District of Columbia*, the defendants, police officers, claiming qualified immunity argued that the plaintiff's Due Process right not to be held in temporary custody with males has not been clearly established in law.[214] The court disagreed, emphasizing the significance of the plaintiff's legal status as female.[215] In explaining its reasoning, the court distinguished *Shaw* from a case in Arizona, where the plaintiff did not have a clearly established constitutional right to be housed in a women's

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209 *Id.* at 160.

210 The legalization of same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), warrants a question whether courts that previously refused to consider MTF transgender people as women for purposes of opposite-sex marriage will reverse their stance. Courts' reluctance to recognize transgender people as legal husbands or wives was understandable in the context of prohibition of same-sex marriage but misguided. While sexual orientation and sexual identity are intimately intervened, they are distinct concepts. Declaring post-operative transgender individuals as legal wives or husbands would not equal to allowing same-sex marriage take place.

211 M.T. v. J.T., 355 A. 2d 204 (Super. Ct. App. Div. 1976).

212 *Id.* at 88.

213 Shaw v. District of Columbia, 944 F. Supp. 2d 43, 59 (D.D.C. 2013).

214 *Id.* at 57.

215 *Id.*

detention facility because she was not legally female.[216] There, the plaintiff also identified as a transgender woman, had undergone surgical alterations to her body to appear more feminine, was taking hormones, but had not yet undergone sex-reassignment surgery.[217] The Arizona court held that the plaintiff had not identified any legal authority holding that a transgender woman with intact "male" genitalia has a constitutional right to be housed in an immigration detention facility for females.[218]

Upon examination of these cases, society's obsession with genitalia and the notion that it dictates a person's sex is apparent. The courts may disagree whether sex-reassignment surgery makes someone a man or a woman, but they do agree that *external* genitalia, whether "real" or achieved through surgery, is determinative of a person's status as a man or a woman. Thus, an individual's right to self-identify is ignored and completely depends on whether the court recognizes only the genitals the individual was born with.

Courts that take into consideration only the birth sex and genetic structure of an individual place too much importance on the authenticity of chromosomes.[219] It is impossible to know whether one is born with female or male chromosomes without testing to confirm their chromosomal authenticity.[220] For most people, checking up on their chromosome configuration is hardly at the top of their list during annual check-ups, so it is likely that there are more individuals with ambiguous chromosomes than current statistics show.[221]

Judith Butler's suggestion that "bodies . . . only live within the productive constraints of certain highly gendered regulatory schemas . . . becomes more apparent in light of the process that takes place at childbirth."[222] Whenever an infant is born with ambiguous genitalia or a "micro-penis," the gender and societal norms, not genetic make-up, determine the sex of an infant.[223] Infants born with ambiguous genitalia are first subjected to genetic testing to determine their chromosome configuration.[224] If the test results reveal an XX configuration, surgery is

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216 *Id.* (citing to Guzman-Martinez v. Corr. Corp. of Am., No. CV 11-02390-PHX-NVW, 2012 U.S. Dist. LEXIS 97356 (D. Ariz. July 13, 2012)).

217 *Guzman-Martinez*, 2012 U.S. Dist. LEXIS 97356, at *5.

218 *Id.* at *25–*26.

219 *See* Tamar-Mattis, *supra* note 33, at 63–64.

220 Myra J. Hird, *Gender's Nature: Intersexuality, Transsexualism, and The 'Sex'/'Gender' Binary*, 1 FEMINIST THEORY 347, 353 (2000).

221 *Id.*

222 FAUSTO-STERLING, *supra* note 197, at 75.

223 Hird, *supra* note 220, at 353.

224 *Id.*

performed to shape the infant's genitalia into a vagina.[225] If there is a XY configuration, doctors conduct more testing to see if genital tissue is responsive to androgen treatment, which aims to enlarge the genitalia so it could resemble an "actual" penis.[226] If the treatment fails, the ambiguous genitals are transformed into a vagina and an infant with XY chromosomes is raised as a female, often unaware of the procedures that took place.[227]

> Surgeons aren't very good at creating the big, strong penis they require men to have. If making a boy is hard, making a girl, the medical literature implies, is easy. Females don't need anything built; they just need excess maleness subtracted. As one surgeon well known in this field quipped, "you can make a hole but you can't build a pole."[228]

This shows not only that reliance on chromosomes can be misleading, but also how the actual *sex* of the infant is determined. The size of a prospective penis is used to decide the sex of an infant, not genetic make-up.[229] What constitutes an "appropriately sized penis" is not dictated by biology, but gender and societal expectations.[230] Furthermore, gender traits and stereotypes are not similar in every cultural system. In some cultures, femininity is associated with power rather than submission and nurture. The reading of nature is done through sociocultural lenses—just as gender is sexed into masculine and feminine categories, sex is gendered into male and female categories.

Discrimination against crossdressing men and transvestites is technically gender stereotype discrimination that is explicitly prohibited by *Price Waterhouse*, but crossdressers also fall under the transgender umbrella because they challenge the gender norm, go against the social grain, and cross gender boundaries, if only temporarily. Is there a sincere need for a separate class if another alternative is to simply educate the masses that sex and gender is not black and white and the reading of the word "sex" should not be narrowed down to male and female?

The courts' lack of recognition of people who do not appear traditionally male or female, of people who do not identify as either, or people who self-identify as trans can be directly attributed to the sex-gender distinction. The application of *Price Waterhouse* to transgender discrimination cases is a prime example of this harmful distinction. Instead

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225 *See id*. at 361.

226 *Id.*

227 *Id*. at 364.

228 FAUSTO-STERLING, *supra* note 197, at 59.

229 *See id.* at 59–60; *see also* Hird, *supra* note 220, at 351.

230 Hird, *supra* note 220, at 351.

of allowing plaintiffs to self-identify and file claims as trans women being discriminated against because they are trans women, the *Price Waterhouse* framework only recognizes discrimination of a person who is biologically "X" but acts and behaves as "Y."[231] *Schroer*, on the other hand, embraced the notion that transgender individuals have a right to self-identify with the sex they want and rejected the practice of placing trans plaintiffs into the categories of the sex assigned to them at birth.[232] Instead of perceiving Schroer as a male who underwent sex-reassignment because he identifies as a woman, Judge Robertson saw a woman who was being punished for taking steps to finally become comfortable with herself. Robertson's acceptance of Schroer's claim that she is a woman subverted the approach of other courts viewing transwomen as women with male bodies.

Does Law Imitate Life or Does Life Imitate Law?

Interpretation of statutory language equips the judiciary with a powerful ability to define categories and decide which category a person belongs to. This ability was used to shape race relations in the United States since the days of slavery and continues to do so now.[233] Modern battles over the interpretation of "sex" are reminiscent of forgotten and infamous precedents, such as deciding what makes someone "white" and "non-white" to deny people of color freedom or citizenship.[234]

It has been long established that race is not rooted in biological reality, but is sociopolitical in nature.[235] The notion that there is only one race, the human race, is cliché, but accurate. Despite variances in hair and skin colors and the shape of one's eyes, differences between individuals of the same race are often greater than the differences between the "average" individuals of different races.[236] However, social constructions of racial categories have long been used as a means of achieving various social purposes.[237]

In the United States, the categorization of people based on their race was created to enhance and solidify the socioeconomic institution of

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231 *See* Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657, 657 (W.D. Pa. 2015).

232 *See* Schroer v. Billington, 577 F. Supp. 2d 293, 293 (D.D.C. 2008).

233 Frank H. Wu, *From Black to White and Back Again, White By Law: The Legal Construction of Whiteness*, 3 ASIAN L.J. 185 (1996).

234 *Id.* at 189.

235 Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 518 (1995).

236 *Id.* at 523.

237 *Id*. at 524.

slavery.[238] The categories did not emerge from a vacuum, but were rather carefully created through law and pseudo "racial" science.[239] The creation was indirect because early laws defined race in terms of blood or ancestry. Because both are not readily apparent to society, blood ancestry had to be inferred from physical appearance.[240] This proved to be ineffective after an increase in biracial people, who could have passed as "white," so the laws became more stringent.[241] The end result was the famous "one-drop rule" that mandated placing everyone who has one drop of black blood into the black race category, regardless of their appearance.[242]

In *In re Ah Yup*, a circuit court held that petitioner, a Chinese man, was not considered white, and was thus not eligible for naturalization.[243] In his holding, the judge relied on the ordinary meaning of the word "white," dictated by the "well settled meaning in common popular speech . . . [as understood] everywhere" in the United States.[244] Similarly, a Japanese man in *Ozawa* was denied naturalization despite arguing that he was "white" within the meaning of the word because his skin color was actually white.[245] The Court, reverting to its "one-drop" rhetoric, held that skin color alone is not determinative of race.[246] The Court rejected a literal statutory interpretation approach, focusing instead on the intent of the legislature and came to the conclusion that, by the words "white person," the legislators only meant to include people of Caucasian decent.[247] Ozawa, despite his fair complexion, fell under the Mongolian racial category.[248]

The cases above represent only a small sample of case law that played a major role in crafting racial categories. Nonetheless, they demonstrate that courts play an important role in creating and enforcing social categories through interpretation of statutory language. Courts in the past assumed that they knew what it meant to be "white," just like the courts now assume that they know what it means to be a man or a woman. Some courts, wary of defining "sex" broadly, reserved the right to do so for the legislature[249] and some relied on Congress' inaction as indication that "sex" was intended

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238 *Id.* at 520–21.

239 *Id.* at 545.

240 *Id.* at 523–24.

241 Wright, *supra* note 235, at 524.

242 *Id.*

243 Carrie Lynn H. Okizaki, *"What are You?": Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463, 478 (2000).

244 *Id*.

245 *Id*.

246 *Id*.

247 *Id.*

248 *Id*.

249 Etsitty v. Utah Transit Auth., 502 F. 3d 1215, 1221 (10th Cir. 2007).

to be read narrowly.[250] However, as *Schroer* correctly pointed out, "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."[251]

In addition, the argument that Congress never considered nor intended that the word "sex" apply to anything other than its ordinary meaning because it was a last-minute addition to the Civil Rights Act of 1964 is moot.[252] It may be argued that clinging to the ordinary meaning of "sex" is narrow-minded, since Congress did not contemplate what should be considered under "sex."[253] Moreover, as noted by Justice Scalia in *Oncale v. Sundowner Offshore Services*, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils. . . ."[254] Amending statutes that prohibit sex discrimination to include transgender discrimination is likely to turn out problematic in the future for reasons discussed throughout Part II. Sex and gender do not exist in binaries; they extend beyond male and female, masculine and feminine. There are countless identities that do not fit into neat "transgender woman" and "transgender man" categories. "Othering" people who do not identify as a man or a woman will reinforce the binary male/female sex hierarchy.

CONCLUSION

When an inmate is segregated, and placed into isolation, administrative or otherwise, solely because they are transgender, intersex, or gender nonconforming, the Fourteenth Amendment is violated. The courts must acknowledge transgender discrimination as sex discrimination and apply heightened scrutiny to determine whether such segregation furthers an important government interest in a way that is substantially related to that interest.

The current transgender discrimination framework, under *Price Waterhouse*, will not work in the long term and does not work for trans inmates in solitary confinement. The *Price Waterhouse* framework forces plaintiffs to file claims as non-gender conforming men or women, which essentially denies the very existence of trans people and genderqueer folk. Furthermore, the *Price Waterhouse* framework provides relief to

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250 Ulane v. E. Airlines, Inc., 742 F. 2d 1081, 1085 (7th Cir. 1984).

251 *Schroer*, 577 F. Supp. 2d at 308 (quoting Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990)).

252 *Ulane*, 742 F.2d at 1086.

253 *Id.*

254 Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 79 (1998).

transgender plaintiffs that do not conform to gender stereotypes and exhibit behavior in conflict of their biological sex. Trans inmates, on the other hand, are placed into administrative segregation because of their status as transgender, often under misleading or unwarranted concern for their safety. To avoid othering transgender and non-gender conforming individuals, a solution should consist of trans inclusivity to the level where trans individuals fit perfectly within the understanding of sex and gender, and not occupy a small category where their existence is divided between two sides. Understanding that "sex" extends beyond "male" and "female" and recognizing that transgender discrimination *is* sex discrimination will do just that.

To be clear, the assumption that trans women are vulnerable to attacks is not incorrect. There are instances of trans women requesting to be placed into protective custody to protect themselves from harm and abuse. However, such requests, due to the psychological damage of isolation, abuse by the prison staff, and poor conditions of solitary confinement cells, are comparable to a trapped animal forced to chew off its own leg to escape and are hardly ideal. We must also provide trans inmates with an environment where they are not forced to subject themselves to complete isolation to survive. The prison system in the United States needs to develop more effective policies regarding housing transgender inmates, not leaving them with limited options of either remaining in the often-hostile general population or spending their incarceration period in isolation. The desire to be free of harm and the desire to not be isolated from the population should not be mutually exclusive.

The experience of gender is internal; it cannot be accurately determined by genitals or appearance. A prisoner's self-identity should be the driving force behind housing assignment decisions. The housing policies instituted in the city of Denver have been largely successful, with the Department of Corrections recommending other jails and prisons across the United States to follow their model. The most significant detail about the housing policies in Denver jails is the detainee's agency and the right to self-identify. Detainees in Denver jails are able to take private showers, request to be housed with other trans inmates, and request a male or female guard to perform strip searches.[255] Furthermore, the incorporation of sensitivity training for the jail employees and education on the importance of gender identity and proper nouns[256] may contribute to reducing staff violence against transgender inmates.

However, Denver's policy of automatically barring trans women with

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[255] *See* Brown, *supra* note 92.

[256] *Id.*

records of sexual assault from being assigned to female housing units creates another pocket of prison population in need of proper assignment. An ideal solution would be to create a separate housing unit for transgender, intersex, or non-gender conforming prisoners who are somehow disqualified from being assigned into units matching their gender identity. Such housing must be carefully crafted to avoid further marginalization of transgender individuals. Separate housing for non-gender conforming individuals will also provide protection to those who do not identify as transgender, but are at risk of being sexually assaulted or abused.

The change will not happen overnight; it will not happen for many years to come. The implementation of this framework must begin at the fundamental institutions of our society, such as schools and households. It must begin with our children and the deconstruction of a notion that there is a huge difference between men and women. This framework does not call for abolishment of sex categories, nor does it invalidate the reality and experiences of men and women. What this framework does is challenge the binary sex hierarchy and provides a legal and societal space for those existing outside of it.